United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7317

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

—against—

HENRY H. WELDON,
Defendant-Appellee.

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

—against—

CHARLES B. WRIGHTSMAN and JAYNE WRIGHTSMAN,
Defendants-Appellees.

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

—against—

METROPOLITAN MUSEUM OF ART,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES WRIGHTSMAN

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Plaintiff appeals from an order of Hon. Dudley B. Bonsal of the United States District Court for the Southern District of New York, granting summary judgment to defendants Mr. and Mrs. Wrightsman on the ground that the Act of State doctrine bars plaintiff's claim for conversion of an art object appropriated by the Government of the Soviet Union and subsequently sold at public auction in 1931.

STATEMENT OF THE ISSUE

Whether the District Court erred in granting summary judgment for defendants where they introduced evidence demonstrating that the Act of State doctrine barred plaintiff's claim, and where plaintiff made no effort to deny or in any way to negate the accuracy of the facts on which defendants' motion was based.

STATEMENT OF THE CASE

This action was brought by George Stroganoff-Scherbatoff, who claims to be a descendant of one of Imperial Russia's noble families. The complaint alleged that the Wrightsmans converted to their own use and benefit a marble bust of Diderot which allegedly belonged to his forebears prior to the Russian revolution. Although Mr. Wrightsman purchased the bust for $48,000 in 1965 (Wrightsman Affidavit, par. 2), plaintiff sought damages in the amount of $350,000.

The Wrightsmans denied plaintiff's allegations of wrongdoing and asserted various affirmative defenses. The motion for summary judgment was based on one of those affirmative defenses—the Act of State doctrine.

This appeal also involves two other lawsuits brought by plaintiff. One is against the Metropolitan Museum of Art alleging conversion by the Museum of the same bust of Diderot, which was donated to the Museum by Mr. Wrightsman. The other is an action for conversion of a painting against Henry H. Weldon. All three cases were assigned to Judge Bonsal. Mr. Weldon had also moved for summary judgment, relying in part on the Act of State doctrine. Judge Bonsal's opinion of May 18, 1976 granted summary judgment to the defendants in all three cases.*

Statement of Facts

The bust of Diderot was sculptured in 1773 by Jean Antoine Houdon. Plaintiff alleges that his ancestor Count Alexander S. Stroganoff (1733-1811) acquired the bust during a sojourn in France (Defendants' Exhibit A, p. 10). The bust became part of the collection of paintings, sculptures, and art objects amassed by Count Stroganoff and known as the Stroganoff collection. (Defendants' Exhibit B, pp. 1-3).

Following Count Stroganoff's return to Russia, the collection (including the Diderot bust) was housed at the Stroganoff Palace in St. Petersburg, where it remained until at least 1919, when plaintiff left Russia. (Defendants' Exhibit A, pp. 10, 12).

In 1919, the Soviet Government organized a museum in what had been the Stroganoff Palace. The palace-museum opened its doors to the public in the fall of 1919. (Defendants' Exhibit C, p. 2). A guide to the museum, published

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* Two other cases brought by this plaintiff, one against Mr. Wrightsman and another against the Museum involving the same claims with respect to another art object, are pending before Judge Bonsal and await the outcome of this appeal.

in 1922 by the Russian Academy of Sciences, specifically refers to the Diderot as an exhibit in this government financed and controlled museum. (Defendants' Exhibit C, p. 8). In addition, Decree No. 245 of the All-Russian Central Executive Committee and the Council of People's Commissars (promulgated on March 8, 1923) shows that, at least as of 1923, all objects in such museum collections were "recognized as the property of the State", i.e. nationalized. (Defendants' Exhibit G, par. 5).

The Stroganoff collection, including the Diderot, remained on public display until May 1931 when it was transported to Berlin for sale at public auction pursuant to the direction of the Soviet Government. (Defendants' Exhibit D, pp. 1-2; Defendants' Exhibit E, Plaintiff's Answer to Defendants' Interrogatory No. 7; Defendants' Exhibit F, Exhibit 1 to this brief).* Plaintiff claims that at the time the bust was sold at the 1931 auction in Berlin, his mother, Princess Scherbatoff, was the rightful owner of the bust. (Defendants' Exhibit A, pp. 8-12). Although Princess Scherbatoff did not attend the 1931 Berlin auction, both she and the plaintiff knew the sale was to take place, and she did protest the auction by a letter to the auction firm. (*Id.* at 14, 17). That letter, which was reported in newspapers throughout the world (*id.* at 17), admitted the appropriation of the entire Stroganoff collection by the Soviet Government:

> "The Soviet republic has taken possession of this collection in a way that sets at defiance every principle of international law." (Defendants' Exhibit F, p. 2, Exhibit 1 to this brief).

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* For the convenience of the Court, Defendants' Exhibit F in the District Court, a copy of a May 13, 1931 New York Herald Tribune article, which plaintiff claims is illegible in the record, is reproduced as Exhibit 1 to this brief, p. A-1, *supra*.

On November 14, 1974, Mr. Wrightsman donated the bust (which he had purchased in 1965) to the Metropolitan Museum of Art, which is the current owner of the bust. (Wrightsman Affidavit., pars. 2, 3).*

The Materials Presented to the District Court

The defendants presented evidence in support of their motion which amply supported the factual assertions on which their motion was based. As is required in the Southern District of New York, those material facts were also set forth in defendants' Statement Pursuant to Local Rule 9(g). Notwithstanding the requirements of Rule 9(g), plaintiff did not submit any counterstatement in compliance with that rule (but only a statement of certain other facts as to which he contended there was *no* issue); plaintiff did not refute any of the facts on which defendants' motion was based, and made no attempt to explain his failure or inability to do so.

The facts admitted by plaintiff in his responses to discovery requests, the various publicly available and historical records defendants presented to the District Court, and plaintiff's consistent failure to refute any of the facts presented by defendants clearly demonstrated that the entire Stroganoff collection, including the bust of Diderot, was nationalized by the Soviet Government shortly after the Russian revolution.

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* Plaintiff erroneously claims that Mr. Wrightsman donated the bust to the Museum after plaintiff had demanded possession of the bust. (Pl. Br., pp. 3, 16). Although irrelevant to the determination of this appeal, the gift to the Museum was made one week prior to the date of the demand to Mr. Wrightsman.

The Decision of the District Court

On May 18, 1976 the District Court, after reviewing the record presented by all the parties, entered an order granting summary judgment to the defendants in all three cases on the ground that the Act of State doctrine barred plaintiff's claims.*

The District Court found that the record showed that the works of art "were appropriated by the Soviet Government" and that they "were appropriated in Russia, prior to the Lepke [Berlin] auction and were transported to Berlin by the Soviet Government solely for the purpose of the public sale." (Slip Op., pp. 6-7).

After reviewing the principal authorities in point,which plaintiff did not and does not dispute, Judge Bonsal concluded that "on this record, plaintiff is precluded from recovery by reason of the Act of State Doctrine". (Slip Op., p. 8).

ARGUMENT

The District Court Properly Concluded That No Genuine Issue of Material Fact Was Raised For Trial.

Rule 56(e) of the Federal Rules of Civil Procedure provides that:

> When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleading, but his response,* by affidavits or as otherwise provided in this rule, *must set forth specific facts*

* The District Court also noted, although it did not reach the issue, that plaintiff's claims appear to be also barred by the statute of limitations (Slip Op., pp. 8-9).

> *showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed.R.Civ.P. 56(e) (emphasis added).

These sentences were added to Rule 56 in 1963 for the express purpose of overturning a line of cases in which the utility of the summary judgment procedure had been impaired by a reluctance to grant summary judgment if the pleadings on their face presented an issue. In recommending the proposed amendment the Advisory Committee noted that:

> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Note, Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 648-49 (1962).

Rule 56(f) provides temporary relief for the opponent of a summary judgment motion if a proper showing is made, but does not relieve that opponent of his obligation either to come forward with facts which are within his power to produce or to indicate specifically why he is unable to meet his burden under Rule 56(e). Plaintiff has not met that obligation: he did not come forward with any facts to refute the factual showing submitted by the defendants; nor did he attempt any explanation of his failure to do so.*

Rule 9(g) of the General Rules of the District Court, which quantifies the general standards of Rule 56, makes

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* In view of plaintiff's background, it is reasonable to assume that he had at least equal—if not greater—access to any relevant facts than did the Wrightsmans.

plaintiff's deficiency even more obvious. That rule requires plaintiff to include:

> "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried."

No such statement was submitted (but only a statement of certain other facts as to which he contended there was *no* issue); plaintiff made no effort to refute any of the facts on which defendants' motion was based, despite Judge Bonsal's generous allowance to plaintiff of an extra ten days after oral argument of the summary judgment motion "to put in any paper you want to put in". (Transcript of Hearing, December 8, 1975, p. 11).

Rule 9(g) further provides that the statements in the 9(g) statement of the moving party (here the defendants):

> "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Thus, plaintiff's failure to comply with Rule 9(g) constitutes his admission of the facts adduced by the defendants and of his total inability to contest those facts. That failure demonstrates the absurdity of plaintiff's present claim that he was denied his day in court.

The failure of a party to satisfy the requirements of Rule 56 has been held to justify the granting of summary judgment even in antitrust cases where courts have traditionally been most reluctant to grant summary relief. *Willmar Poultry Co.* v. *Morton-Norwich Products Inc.*, 520 F.2d 289, 293 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976):

> "Regardless of the propriety of summary judgment before discovery in an antitrust case, summary judgment is always warranted where the party resisting

> the motion does so by relying solely upon his pleadings and submits no evidence to rebut the moving party's conclusive demonstration of absence of a genuine issue of material fact. Fed. R. Civ. P. 56(e) mandates affirmative action by a party opposing such a motion. Failure to take such action justifies a court in entering summary judgment, regardless of whether the case alleges a violation of the antitrust laws."

See also First National Bank v. *Cities Service Co.*, 391 U.S. 253, 288-90 (1968); *Beal* v. *Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972). Although plaintiff here filed an opposing affidavit, the affidavit is wanting under Rule 56 because it fails to set forth any facts showing there is a genuine issue for trial. Hence plaintiff is in the same posture as the parties resisting the summary judgment motion in *Willmar*.

Notwithstanding plaintiff's failure to satisfy the requirements of Rule 56 (and Local Rule 9(g)), and his acceptance of the validity of the Act of State doctrine and the authorities cited by defendants (*see* Pl. Br., pp. 5, 7), plaintiff purports to question the sufficiency and authenticity of the evidence submitted to the District Court by defendants. The total lack of substance of plaintiff's arguments is easily demonstrated.

A. Defendants' Evidence Conclusively Established The Applicability Of The Act Of State Doctrine

As plaintiff has conceded throughout this case, the long-recognized Act of State doctrine requires that the Courts of this country refrain from any independent examination of the validity of a taking of property by a sovereign state where (1) the foreign government is recognized by the United States at the time the lawsuit began and (2) the challenged taking of property by a foreign sovereign oc-

curred within its own territorial boundaries. *E.g., Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964); *Ricaud* v. *American Metal Co.,* 246 U.S. 304 (1918); *Oetjen* v. *Central Leather Co.,* 246 U.S. 297 (1918).

The evidence adduced by defendants showed, in several different ways, that the Diderot bust had been "taken" by the Soviet Government within the territorial confines of the Soviet Union. Plaintiff's efforts to fabricate a factual issue with regard to the question of the governmental appropriation of the bust involve, *inter alia,* the contradiction of his own and his mother's prior statements and should be given short shrift by this Court.

1. *Plaintiff Has Previously Admitted A Taking By The Soviet Government*

Plaintiff, his attorney and his mother (through whom he claims title to the Diderot bust) have admitted that the bust was taken and sold (obviously after the taking) by the Soviet Government. In chronological order, those admissions were as follows:

(a) Plaintiff testified that in May 1931, at the time of the sale of the Diderot bust in Berlin, plaintiff's mother protested the sale by a letter to the auction firm which was publicized in newspapers throughout the world. (Defendants' Exhibit A, p. 17). That letter, reported in the May 13, 1931 issue of the New York Herald Tribune under the headline "Stroganoff Art Sold in Berlin by Soviet Order", stated:

> "This collection remains entirely my property. *The Soviet Republic has taken possession of this collection* in a way that sets at defiance every principle of international law." (Defendants' Exhibit F, p. 2, Exhibit 1 to this brief) (emphasis added).

Plaintiff's efforts to "explain" (if not retract) his mother's admission almost 45 years after the fact and 30 years after her death are anything but convincing, to put it mildly.*

(b) In response to defendants' interrogatories, plaintiff admitted that:

> "the bust was sold on or about May 13, 1931 at an auction sale in Berlin, Germany pursuant to the direction of the USSR." (Plaintiff's Answer to Defendants' Interrogatory No. 7, Defendants' Exhibit E).

It is difficult to imagine, and plaintiff makes no effort to explain, how the Diderot bust could have been sold at the direction of the Soviet Union without the Soviet Union first having "taken" the bust.

Approximately seven months after making this admission, and only after its significance had been brought home to him by defendants' motion for summary judgment, plaintiff sought to "correct" his prior statement. He claimed that the auction catalogue states that the sale was "Im Auftrag der Handelsvertretung der Union der Socialistischen Sowjet-Republiken," that the translation of that phrase is "By Order of the Commercial Representation of the USSR," and that the term "Commercial Representation" had not been sufficiently identified to connect it with the Soviet Government. Plaintiff suggested that we may be dealing with a private as opposed to a governmental organization and that the crucial link to the Soviet Government may be missing. Hence he sought to change his response to

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* The District Court quite properly attached significance to this well-publicized admission by the person through whom plaintiff claims ownership of the bust. (Slip Op., p. 6).

Interrogatory 7. (Plaintiff's Affidavit in Opposition to Defendants' Motion for Summary Judgment, pp. 6, 8-9).

Plaintiff's argument, which is also raised on this appeal (Pl. Br., pp. 13, 15), was and is at best specious. First, it is incontrovertible that in the Soviet Union the state (or one of its organs) is the only avenue for international trade and that all foreign trade is a government monopoly. *E.g.*, Decree of April 22, 1918, Nationalization of Foreign Trade § I (1918)*. Thus, the Diderot bust could only have been sold in Berlin by a governmental agency.

Second, and more important, plaintiff's interpretation of "Handelsvertretung" as meaning "Commercial Representation" of a non-governmental character is simply incorrect. As defined in a leading German encyclopedic dictionary, "Handelsvertretung" idiomatically translates as a foreign country's Trade Consulate or Trade Mission.** Hence the term in the auction house catalogue (which plaintiff conceded to be genuine in his District Court brief, p. 13) confirms that the sale of the entire Stroganoff collection—including

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* Source: J. Meisel and E. Kozera, Materials For The Study of The Soviet System, Doc. No. 48 (1st ed. 1950). A copy of this decree is included in the pamphlet of Soviet statutory and constitutional materials which were presented to the District Court and which is being filed in conjunction with this brief pursuant to Rule 28(f) of the Federal Rules of Appellate Procedure.

** The exact definition contained in the German encyclopedic dictionary [5 Der Grosse Brockhaus 241 (1954)] translates as follows: "Handelsvertretung":

> Foreign offices of countries with foreign trade monopoly for establishment and accomplishment of the commercial intercourse, sometimes established before the taking up of diplomatic relations. The "Handelsvertretung" and its members enjoy diplomatic privileges only in case of express contractual agreement and have to abstain from political activity. (See Supplemental Affidavit of J. H. Wille dated December 5, 1975.)

The closest idomatic English translation of "Handelsvertretung" is "Trade Consulate" or "Trade Mission." (*Id.*)

the Diderot bust—was held "By Order of the Trade Consulate of the Union of Soviet Socialist Republics", i.e., the Soviet Government. On the basis of the uncontroverted record, Judge Bonsal quite properly found that the 1931 auction sale of the entire Stroganoff Collection:

> "was held by order of the Handelsvertretung and as such was carried out under the direction and with the consent of the Soviet Government." (Slip Op., p. 8).

(c) In *Stroganoff-Scherbatoff* v. *Weldon,* 74 Civ. 626, which was decided by Judge Bonsal together with this case and consolidated for appeal to this Court, both plaintiff and his attorney submitted affidavits in opposition to Weldon's motion for summary judgment. Those affidavits were sworn to in May 1975. Both plaintiff and his attorney admitted that, in connection with the 1931 Berlin sale of the Stroganoff collection, the "consignor" of the art objects was the Soviet Union. (Stansky Affidavit, p. 1; Plaintiff's Affidavit, p. 3—in 74 Civ. 626).

(d) Finally, at the oral argument of the summary judgment motion in the case at bar (on December 8, 1975), plaintiff's attorney admitted that there was no question about the Soviet Government having nationalized all of the Stroganoff houses and real property. (Transcript of Hearing, December 8, 1975, p. 8).*

Plaintiff should not be allowed to retract previous admissions because he has belatedly realized that those admissions defeat his claims.

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* Plaintiff's unsupported contention that the seizure of the Stroganoff Palace does not indicate a similar taking of its contents is absurd, especially in light of the record in this case.

2. *Defendants Have Demonstrated The Applicability Of The Act Of State Doctrine*

The other materials presented to the District Court also provide convincing support for defendants' contention.

(a) Plaintiff's own testimony was that the Diderot bust was in the Stroganoff Palace when he left Russia in 1919. (Defendants' Exhibit A, p. 4; Plaintiff's Affidavit in Opposition, pp. 2-3).

(b) The Guide to the Stroganoff Palace-Museum (Exhibit C) shows that the Stroganoff Palace became a museum in late 1919, under the control of the Section of Museums. The Guide also identifies the Diderot bust as one of the Museum's exhibits.

Plaintiff questioned the identity of the Section of Museums —whether it was a public (governmental) or private organization. However, defendants' Exhibit G (Decree No. 245 of March 8, 1923 promulgated by the All-Russian Central Executive Committee and the Council of People's Commissars) identifies the Museum Section as part of the People's Commissariat of Education—unquestionably a governmental body.*

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* Plaintiff also questioned the identity and authority of the Commissariat of Education, the All-Russian Central Executive Committee, and the Council of People's Commissars. Should the Court have any doubt that these organizations were integral parts of the Soviet Government we refer the Court to the Constitution of the RSFSR, Part III, Chs. VII, VIII, IX (1918), and to the Constitution of the USSR, Part II, Chs. IV, VI, X (1923), which identify the organizations in question and define their powers and functions. The source of these documents (copies of which are included in the pamphlet of Soviet statutory and constitutional materials being filed in conjunction with this brief) is: J. Meisel and E. Kozera, Materials For The Study of The Soviet System, Doc. Nos. 54, 79 (2d ed. 1953). *See also* Definitions of Commissar and Commissariat, Webster's New Internat'l Dict. 538 (2d ed. 1967).

(c) Decree No. 245 further shows that, as of 1923, all objects in museum collections were "recognized as the property of the State" (par. 5), i.e., nationalized. This plainly covers the entire Stroganoff collection—including the Diderot bust.

In addition, Decree No. 111 of the Council of People's Commissars published on March 5, 1921 (*See* Defendants' Exhibit A, p. 13) nationalized all movable property of citizens who had fled the Soviet Union. Thus, as the District Court found, the Stroganoff collection was appropriated by either or both of these decrees, and certainly no later than 1923.*

Although plaintiff may question the legality of the seizure and sale of the Stroganoff collection under the Soviet decrees involved here (as his brief appears to at page 11), the determination of that question is irrelevant to this case. Both the Supreme Court and this Court have specifically stated that, in situations such as the case at bar, courts should not attempt to determine the legality (according to the internal laws of the foreign state) of the taking of property. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 415 n.17 (1964); *Banco de Espana* v. *Federal Reserve Bank,* 114 F.2d 438, 444 (2d Cir. 1940):

> "It should make no difference whether the foreign act is, under local law, partially or wholly, technically

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* Plaintiff appears to question whether he or his ancestors "fled" from the revolutionary Soviet Government. But the fate that befell many of the Russian nobility (including the Czar and his family), the mass exodus of those nobles fortunate enough to escape with their lives, and the failure of plaintiff's forebears to attempt to exercise any dominion over their possessions makes any supposition other than flight not credible. A court can take judicial notice of the historical situation that existed. *See Underhill* v. *Hernandez,* 168 U.S. 250 (1897).

> or fundamentally, illegal. . . . So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws."

(d) Defendants' Exhibit D is an article from a 1931 issue of the Bulletin of the Society of the History of French Art. It discusses the Stroganoff collection (including the bust of Diderot), states that it had remained in the Stroganoff Palace (which had been transformed into a State museum) until early in 1931, and chronicles the then impending sale of the Stroganoff collection (which had been transported to Berlin for that purpose) by the Soviet Government.

(e) Finally, Defendants' Exhibit B is an excerpt from the 1931 auction sale catalogue (conceded by plaintiff to be genuine) which states that the sale was being held pursuant to the order of the Trade Consulate of the Soviet Government.

In sum, the materials presented to the District Court by defendants, when viewed in their totality, support defendants' position and are inconsistent with any other conclusion.* They furnish ample support for Judge Bonsal's finding that the Act of State Doctrine bars plaintiff's claims. The soundness of that result is underlined by a decision of the British Court of Appeal in a case virtually identical to the case at bar, *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718 (C.A.).

There another Russian refugee noble, Princess Paley Olga, sought to regain certain furniture and art objects that had been sold by the Soviet Government in 1928. Her

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* This Court has previously taken judicial notice of the United States' recognition of the Soviet Government. *See United States* v. *Bank of New York & Trust Co.*, 77 F.2d 866, 868 (2d Cir. 1935), *aff'd*, 296 U.S. 463 (1936).

family palace, where the objects in question had been located, was also in the St. Petersburg area. It too came under the dominion of the Soviet forces and later became a State Museum. Relying on the United States Supreme Court's decisions in *Oetjen, Ricaud* and *Underhill, supra*, the Court of Appeal affirmed the lower court's finding that the same two Soviet decrees cited by Judge Bonsal eradicated any ownership claims the plaintiff might otherwise have had. In addition, the court held that the seizure of the Paley Palace and its contents—in and of itself—constituted an Act of State which transferred the property from the plaintiff to the State. *Id.* at 726-27.

The Soviet regime's similar treatment of the Stroganoff Palace and its contents requires the same result in this case.

B. The District Court Properly Considered Defendants' Evidence

Plaintiff's challenge to the authenticity of defendants' evidence is equally groundless.

Defendants' Exhibits A and E are the deposition of plaintiff in a related case still pending before Judge Bonsal (taken under oath on June 19, 1975), and his own answers to interrogatories propounded by defendants in this litigation. Plaintiff has never questioned the accuracy of the deposition transcript. As noted above (pp. 11-13, *supra*), plaintiff's belated attempt to retract an admission in his answers to the interrogatories is transparent and should be disregarded (as it was by the District Court).

Defendants' Exhibit B consists of copies of excerpts from *Sammlung Stroganoff*, the sale catalogue prepared for the May, 1931 auction of the Stroganoff collection. Plaintiff has previously conceded the authenticity of this exhibit. (Plaintiff's brief in the District Court, p. 13.)

Defendants' Exhibit C is a Russian language copy and an English translation of a publication entitled "The Stroganov Palace-Museum A Brief Guide". It states that it was printed by the Russian Academy of Sciences upon the instruction of the State Museum Fund. Exhibit C is thus self-authenticating pursuant to the provisions of Rule 902 (5) of the Federal Rules of Evidence, which provides that extrinsic evidence of authenticity is not required as to "books, pamphlets, or other publications purporting to be issued by public authority."

Defendants' Exhibits D and F are also self-authenticating. Exhibit D is an article contained in a 1931 edition of a periodical (Bulletin of the Society of the History of French Art); Exhibit F, a newspaper article from the May 13, 1931 edition of the New York Herald Tribune. Rule 902(6) of the Federal Rules of Evidence provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required as "to printed materials purporting to be newspapers or periodicals."

Plaintiff is most vigorous in attacking the authenticity of Exhibit G, a Russian language copy and an English translation of Decree No. 245 of the All-Russian Central Executive Committee and Council of People's Commissars dated March 8, 1923. He also disputes the authenticity of the decrees and constitutions from the Meisel and Kozera compilation of source documents (Soviet statutory and constitutional materials) which were cited to and presented to the District Court. He claims that the District Court failed to comply with Rule 201 of the Federal Rules of Evidence by judicially noticing these foreign legal materials, the authenticity of which allegedly had not been established. However, proof of foreign law is governed by Rule 44.1 of the Federal Rules of Civil Procedure. 1 J.

Weinstein's Evidence ¶200[02] (1975). Rule 44.1 specifically provides:

> "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law."

The advisory note to the 1972 Amendment to Rule 44.1 states that "the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules." Defendants thus were not required to establish the authenticity of documents offered in proof of foreign law. Plaintiff, who has at least equal access to Soviet statutory and constitutional materials as do the Wrightsmans, has never claimed that the legal materials presented by defendants are inaccurate.

The remaining evidence which plaintiff questions are the affidavits of the translators of various foreign language materials. Plaintiff has had ample opportunity to point out and correct any errors in the translations of foreign materials which defendants presented to the District Court. His failure to do so implicitly admits the accuracy of those translations.

In sum, plaintiff's so-called evidentiary challenge is baseless in the context of this record and ignores the stated purpose of the Federal Rules of Evidence:

> "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Rule 102.

The rules were properly construed by the District Court and the resulting judgment in the case at bar is entirely consonant with the objectives of Rule 102.

CONCLUSION

For the reasons stated above, the Order of the District Court entered May 18, 1976 granting summary judgment to the defendants should be affirmed.

Dated: New York, New York
October 4, 1976

Respectfully submitted,

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EXHIBIT 1

[LITE]RARY NOTES

"Where Paris Dines." Mr. Street says that "1915 Burgundy is one of the great wines now in its prime," and should not be overlooked by connoisseurs abroad. "Where Paris Dines" is now available in a thin, pocket-size "airways" edition.

* * *

After visiting New York for the production and publication of "Brass Ankle," DuBose Heyward and his wife, Dorothy Heyward, have returned to their home in North Carolina, where Mr. Heyward will finish a novel he has been working on. Mrs. Heyw[ard] [l]eft a mystery story, "Damnation," [in] the hands of her publishers.

* * *

William McFee, who is finishing his new novel, "The [H]arbour-Master," writes to his publishers: "I am now in the condition of a man who is running the last lap of a race in a fainting fit; he may be doing fine, but he doesn't know anything about it. The awakening will come when I get around to revising the typescript. My typist lost patience with Mr. Spenlove several hundred pages ago. The general idea of the Spenlove character is to provoke thought, but the typist says she wants to kill him."

* * *

Dorothy Parker's next book, to be published a month hence by the Viking Press, bears the cheering title "Death and Taxes." It is a collection of poems. Her last, "Laments for the Living," is to be translated into Swedish.

* * *

Caroline Lockhart, author of "The Dude Wrangler," writes from her Western ranch to testify to the universal human appeal of the "Education of a Princess," by the Grand Duchess Marie. "One of the men could hardly work on a corral he was building because of his eagerness to know what was going to happen next to the Grand Duchess."

* * *

John L. Heaton, for many years an associate editor of "The New York World," has joined the Vanguard Press in an advisory capacity.

* * *

The author of "Break Up," Hagar Wilde, sold her first short story for $25 when she was only fourteen. She is now just twenty-five and has gone to Hollywood at a salary reported to be $1,000 a week to write scenarios.

[NEWS] OF THE SCREEN

Fields to Write for RKO-Pathe

Joseph A. Fields, playwright and fiction writer, has joined the RKO writing staff, his first assignment to be a screen adaptation of Eunice Chapin's novel, "Pick Up." Helen Twelvetrees will star in it. Mr. Fields wrote "Love For Sale" and "Broken Wings," among other plays. He is a graduate of New York University.

Marx Brothers' Father A[ctor] Now

Mr. Samuel Marx, the [s]eventy-two year old father of the Marx brothers, has finally [dec]ided to follow in the footsteps of [his] talented sons and become an actor. He will make his debut in "Monkey Business," the picture his boys now are making at the Paramount Long Island studios. Mr. Marx heretofore has confined his activities to business. He will play a small bit in one of the comedy scenes. Far from showing any professional jealousy when their father made known his desire to go on the stage, Harpo, Groucho, Chico and Zeppo got him into their own screen production.

"Liebeswalzer" Continuing

UFA's latest talking picture "Liebeswalzer" (The Love Waltz) continues merrily down at the Eighth Street Playhouse, according to announcements. Willy Fritsch and Lilian Harvey play the principal roles.

George DeSylva Returns

George DeSylva returned yesterday on the Ile de France after a two months' sojourn in Europe. While abroad Mr. DeSylva wrote a story for Janet Gaynor, which David Butler will direct for Fox.

George Arliss Going Abroad

[illegible]

Stroganoff Art Sold in Berlin By Soviet Order

Two Vandykes Bought by Dutchman for $157,080; German Gets Rembrandt

Princess Protests Auction

Russian Living at Paris Threatens to Sue Buyers

By John Elliott

From the Herald Tribune Bureau

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BERLIN, May 12.—The sale of two famous Vandycks, "Nicholas Rockox" and "Balthasarine von Linick," for 660,000 marks ($157,080) to Goudstikker, a Dutch art dealer, was the sensation of the first day of the auction sale of the famous collection of Count Alexander Sergejevich Stroganoff here today. The total realized by today's opening session of the sale, which is being conducted by the Berlin house of Rudolph Lepke at the order of the Soviet Russian government, exceeded 1,600,000 marks ($380,800), which is considered amazingly good in art circles here.

The sale of the Stroganoff collection is considered an art event of international significance and has drawn dealers from many European countries, including Goudstikker from Amsterdam, Sabin and Davis, of the Knoedler firm in London, and both Seligman and Kurt Stern from Paris, as well as museum directors of European capitals, including Professor Martin of The Hague and countless private collectors such as Baron Thyssen, of Germany.

The second highest price of the day was 210,000 marks ($49,980) paid for Rembrandt's "Christ and the Samaritan at the Well." After keen bidding this noted work was bought by Arthur Goldschmidt, of the house of J. and S. Goldschmidt, in Berlin.

One of the biggest surprises of the day was that neither of the two important Poussins, including the widely known "Bacchanel," drew an offer of more than 20,000 marks ($4,998). The item was withdrawn. Two decorative pictures by Boucher were withdrawn as not more than 80,000 marks ($19,040) was offered for them, which was 20,000 marks ($4,998) under the minimum set.

Goudstikker captured Cranach's highly praised "Adam and Eve" for 47,000 marks ($11,186), while Jacob Van Ruysdael's "View over Haarlem" brought 60,000 marks ($14,280), as the result of spirited bidding. Six wall paintings by Hubert Robert brought altogether 151,000 marks ($38,080).

Romney's splendid portrait, "Countess Woronzoff," went for the comparatively low price of 50,000 marks ($11,900) to an English buyer, while Rubens's "Rosenkranz" was sold for 26,000 marks ($6,188) to the Berlin art firm of Blumenreich. Van der Meer's "Night Landscape" went for 10,500 marks ($2,499), and Greuze's charming portrait of a child of Count Stroganoff realized 28,000 marks ($6,664).

As a prelude to the sale Princess Schergatoff-Stroganoff, of Paris, wrote a letter to the Lepke firm protesting against the auction of the St. Petersburg collection, as it is called.

"This collection remains entirely my property," the Princess wrote indignantly. "The Soviet republic has taken possession of this collection in a way that sets at defiance every principle of international law."

She threatened in her own name and "in the name of my legal heirs" to make the buyers responsible for any harm done to the pictures "they thus illegally acquire."

Prize Pictures of Salons Are Put on Exhibition

'Landscape' and 'Spirituals' Lead List at Grand Central

Fifty paintings by American artists have been selected by a committee from among the hundreds in the exhibition of the Salons of America, which closed last Saturday, and were placed on view yesterday at the Grand Central Galleries, 15 Vanderbilt Avenue, until May 26.

Among them are two paintings which tied in the voting for the popular prize of $50 offered by the management of [illegible]

BOOKS and OTHER THINGS

By ISABEL PATERSON

It is ten years since we have had a novel from Mary Austin, so that "Starry Adventure" (Houghton Mifflin) is news as well as fiction. Mrs. Austin has never fallen into any stereotype as a writer, neither her theme nor her style can be anticipated.

In some ways this has been a disadvantage to her. Nothing else has kept her out of the ranks of best sellers, for her quality has long been recognized. Twenty years ago H. G. Wells saluted her as a genius. Her work has never been ignored by reviewers. But the public can only proceed on a broad and well-beaten path; and Mrs. Austin is a pioneer. She has always walked alone. A genuine affinity for the solitude and stark individualism of the desert country led her to explore the Southwest. Many have followed, but she has always led. She has founded a school, and doesn't belong to it herself.

The Genius Loci

Her creative power and deep originality have been singularly fruitful beyond the covers of her books. She did truly discover the indigenous values of that romantic corner of the United States which is Indian and Spanish, not Anglo-Saxon. She belonged there, and found it by a sure instinct. Even as a physical type Mrs. Austin shows no trace of her Middle Western extraction—Puritan at one remove.

Perhaps it is impertinent to dwell on her personal appearance, but it is so striking and so right that it seems like a key to her work. Not only her olive complexion, abundant dark hair and dark eyes, but the grave archaic harmony of her features, suggest the two strains of the Southwest. There is nothing in her ancestry to account for the fact that she reminds one of an Aztec priestess or a Spanish lady of aristocratic lineage.

There may not have been any Aztec priestesses, and Isabella of Castile, the patroness of Columbus, was blue-eyed and had red-gold hair, according to history. That is no matter—an accident. An artist, steeped in the culture of New Mexico, would have been obliged to invent Mrs. Austin's type, if she hadn't existed, if he had wished to depict the genius loci. Even her voice is right—a rich, unhurried contralto. She has the gift of stillness and poise—balance. She sees everything on a large scale.

Unmatched Threads

This, too, is sometimes a disadvantage in fiction. Some of the people in "Starry Adventure" are too insignificant, too thin, for her to do anything with. They aren't unreal, they are simply trivial, as she moves them about, they are puppets. If they belong to the landscape, the simple folks, then Mrs. Austin has no difficulty. They grow for her out of the soil.

The book is therefore astonishingly uneven in merit, like a cloth woven of unmatched threads, faded and flimsy cotton with rich-dyed silk.

The hero himself, young Gardiner Sitwell, never grows up; he remains a little boy to the end, though years enough pass and he is married. Possibly this defect, this appearance of arrested development, is traceable to an error in technique. Mrs. Austin wished to accent the values of the episodes by depicting their effects through a personality, their spiritual impact. She uses the method May Sinclair devised for "Mary Olivier." She begins with Gard, as a little boy, first perceiving the glory of God in the sunset over the Sangre de Cristo ranges.

A Par[illegible]

Mary Austin

Author of "Starry Adventure"

riage, you would go on with it. You supposed you could. Jane didn't want you to feel anything. Was it the meaning of what you had been through, that it wasn't the feeling that mattered? You had felt about Eudora. You could do things for Jane. You could count on Jane to tell you what things." . . . This is Gard at twenty-odd, married, and pondering how to adjust himself after an amorous interlude with a fickle poseuse, a widow who took him up and then ditched him for a handsomer man. Maybe it is only the fact that the prose was first "keyed" to the child's perceptions that makes him seem still a very small boy. The association has been fixed, and cannot be altered by a chronological statement of the passing of the years.

But Grampa Gardiner is memorably realized, a fine, mellow, old prophet, and Gard's mother is charming and true; and Aloysia Liberadita, the Mexican cook is admirable, and the cracked missionary woman is powerfully sketched.

Above all, the country is marvelously felt, made visible, tangible. Every page is steeped in the colors of that sunset, and exhales the fragrance of the desert flowers which blossom among the aromatic sage. And the way of living which that country has molded is convincing. From it Mrs. Austin has drawn a philosophy, which is partly expressed in the plot. Life is not personal. Marriage is not a private adventure of two people, and to undertake it in that spirit is to court failure. And the "starry adventure" which youth expects will surely come, but perhaps not with drums and trumpets. It might be that the adventurer would not know until it was over, that it had happened to him.

Ladies of Spain

A difficult novel to describe is "Valencia," by Leon Tahcheechee (Coward-McCann). Perhaps Mrs. Austin might say that the tragedy which comes to pass in it so gayly is caused by insistence on personal independence. A wandering, expatriated American youth, an artist, Cruss Willard, played idly with the destinies of half a dozen Spanish friends. Willard made his bread by his art, and buttered it by telling fortunes with the tarot cards. So he gave advice which had unexpected consequences, including a duel and an exile. And, of course, he could not help falling in love with several

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